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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 382

JOAO SIMOES BARREIRO,
Petitioner,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

JOAO SIMOES BARREIRO,
1024 De Young Building, San Francisco 4, California,
Petitioner in Propria Persona.

JOSEPH A. BROWN,
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Of Counsel.

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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petition of Joao Simoes Barreiro for a writ of certiorari to review the judgment of the United

States Court of Appeals for the Ninth Circuit affirming the judgment of the United States District Court for the Northern District of California, Southern Division, respectfully shows to your Honors:

(a) OPINIONS DELIVERED IN THE COURTS BELOW.

The District Court of Appeal delivered a memorandum opinion which appears in the printed transcript of record, which is filed with this petition, pages 103-111. The opinion of the United States Court of Appeals is not yet reported but is appended to this petition, as provided in subparagraph (i) of Rule 23 of the Supreme Court Rules.

(b) THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(i) *The date of the judgment sought to be reviewed and the time of its entry: September 13, 1954.*

(ii) *The date of any order respecting a rehearing: September 24, 1954, petition of appellant for a rehearing was denied.*

(iii) *The statutory provisions believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari: 28 USCA Sec. 1254, Subdivision 1.*

(c) THE QUESTIONS PRESENTED FOR REVIEW.

The facts are admitted.

They were for the most part, if not entirely, stipulated to at the trial of the cause in the District Court.

The proceedings of which the present action is the outgrowth go back as far as July of 1943, when plaintiff was arrested on a warrant issued on the purported authority of the then Attorney General, which recited that "he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof" by the Immigration Act of May 26, 1924 or the regulations made thereunder. (T.R. 70.)

To apprise this Honorable Court at the outset of the nature of the case and the injustice and cruelty of the decision of the Immigration and Naturalization Division of the Department of Justice, we now set forth a brief resume of the essential facts which we will hereinafter state in detail.

Plaintiff first entered the United States in 1924. It is alleged that thereafter, and in 1930, he entered the United States at Jersey City, New Jersey, as a stowaway. He has resided in the United States ever since. He has lived an exemplary life. He has acquired substantial property. He married an American woman. They have two children born in this country who are citizens of the United States. The Department of Justice has specifically found that he is a person of good moral character and that his deportation would result in serious economic detriment to his United States citizen wife and children. (T.R. 16.)

He is clearly entitled to relief under the humane provisions of the Act of Congress commonly known as the Dies Bill (USCA Title 8, Section 155, Subdivision (c), as amended in 1942), which specifically authorizes the Attorney General to suspend deportation if the alien is not racially ineligible or inadmissible to naturalization in the United States, **"if he finds that such deportation would result in serious economic detriment to a citizen or legal resident alien who is the spouse, parent or minor child of such deportable alien"**, and unless both Houses of Congress pass a resolution stating in substance that Congress does not favor the suspension of such deportation, the Attorney General "shall cancel deportation proceedings upon the termination of such session," and "the Commissioner shall record the alien's admission for permanent residence as of the date of his last entry into the United States."

The sole ground upon which the Government insists upon tearing plaintiff from his wife and children and giving them the terrible alternative of expatriating themselves and following him into exile, or bidding him an eternal farewell, is that plaintiff, after he had vainly endeavored to enlist in the Armed Forces of the United States, acted on the improvident advice of his local draft board during the second World War and claimed exemption from military service as a neutral alien.

This claim he endeavored to withdraw.

As long ago as March 28, 1945 the Department of Justice ruled that he might withdraw his claim for

exemption and stayed the order of deportation to permit him to do so.

He promptly withdrew "unqualifiedly and unreservedly" the claim of exemption. (T.R. 128.)

Again acting under advice of his local board, he volunteered for induction and service in the Armed Forces of the United States, again withdrawing any and all claim of exemption from military service. (T.R. 130.)

It is now the arbitrary, and, we submit, the inhuman contention of the Department of Justice that a claim of exemption, once made, no matter in what circumstances or under what conditions,—is irrevocable, and cannot be withdrawn.

The department has thus reversed its own former ruling. It has affronted not only the fundamental principles of equity which grant relief against mistakes of both law and fact, but the laws of humanity as well. The trial judge has upheld this ignoble and reprehensible conduct of the department, in this action, which appellant brought against the appellee to obtain a declaratory judgment that he was eligible for suspension of deportation pursuant to the provisions of the Dies Act (8 USCA, Sec. 155(c)); and the Court of Appeals has affirmed the judgment of the District Court upon the sole ground "that the complaint failed to state a claim upon which relief could be granted."

The entire question involved is, therefore, whether an alien who, acting upon improvident advice and

laboring under ignorance and mistake as to the effect of his act, has claimed exemption from military service, is forever barred and precluded from withdrawing his claim and for applying for citizenship.

It is the contention of the petitioner that the United States Court of Appeals has decided a federal question in a way conflicting with the applicable decisions of this Court; and has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such departure by a lower Court, as to call for an exercise of this Court's power of supervision.

(d) THE CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES WHICH THE CASE INVOLVES.

These will be set forth verbatim as required by this rule in the ensuing statement of the case.

(e) A CONCISE STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED.

(1) The pleadings.

The essential and undisputed facts of the case from the original institution of the deportation proceedings against plaintiff to the date of the report of the Presiding Inspector of the Department of Justice on August 4, 1945, are concisely stated in plaintiff's complaint, which we shall now set forth, omitting the caption and the first paragraph which merely pleads the official capacity of the then defendant and the

fact that he is authorized and empowered to administer the Immigration Act of May 26, 1924, and the amendments thereto:

"That plaintiff is an alien, born in the Republic of Portugal, and is forty years of age; that plaintiff entered the United States of America on or about the 22nd day of April, 1930, at Jersey City, State of New Jersey, and ever since the day last aforesaid has been, and now is, a resident of the United States of America; that plaintiff is a member of the white race; that on the 12th day of September, 1942, at Reno, County of Washoe, State of Nevada, plaintiff married Irene Teresa Souza, a citizen of the United States, who was born June 6, 1919, at San Leandro, County of Alameda, State of California, and that there are two children the issue of said marriage, to wit, John Simoes Barreiro, Jr., born September 24, 1942, in Oakland, County of Alameda, State of California, and Alfred Simoes Barreiro, born October 7, 1947, at Oakland, County of Alameda, State of California; that each of said children is a citizen of the United States; that plaintiff is, and ever since his entry as aforesaid into the United States has been, a person of good moral character; that plaintiff, by his own toil, labor and industry, has acquired real property situate in the County of Alameda, State of California, consisting of land improved by an apartment and rooming house, the said real property being of the reasonable and market value of $20,000.00, or more, and that plaintiff derives an income of approximately $300 per month from the said apartment and rooming house, of a net profit of from $150 to $200 per month; that there

are no encumbrances upon the said real property, and that the same is free and clear from all encumbrances; and that plaintiff has personal property consisting in part of a bank account in which there is deposited the sum of approximately $2,000; that plaintiff is living with his said wife and children and that said wife and children are wholly dependent upon plaintiff for their support; that the real property hereinabove referred to has been damaged by fire since testimony was last taken, and in order to restore it plaintiff mortgaged said property in the sum of $1,900, and that plaintiff, for economic reasons, is repairing the said property by his own labor; that in the event that the deportation order hereinafter referred to is carried out and in the event that plaintiff should be deported from the United States of America, serious economic detriment will result to the wife and minor children of plaintiff, all of whom are citizens of the United States of America, as aforesaid.

"That an actual controversy has arisen between plaintiff and defendant as to whether plaintiff is subject to deportation from the United States of America on the ground that at the time of his entry into the United States he was an immigrant, not in possession of a valid immigration visa, and not exempted from the presentation thereof by said Immigration Act, or the regulations made thereunder; and as to whether plaintiff is ineligible for citizenship upon the ground that, in the year 1943, plaintiff claimed deferment from service in the Armed Forces of the United States upon the ground that plaintiff was a neutral alien; that the defendant, by and

through divers officers, inspectors and other officials of the Immigration and Naturalization Service of the United States Department of Justice, of which defendant is the head, claims and asserts the contentions aforesaid; whereas plaintiff alleges that he is entitled to permanent residence in the United States and to the cancellation of certain deportation proceedings which have been heretofore instituted against plaintiff, under and by virtue of the provisions of that certain Act of the Congress of the United States commonly known and designated as the Dies Bill (U.S.C.A., Title VIII, Section 155, Subdivision (c), as amended in 1942), which, so far as applicable, reads as follows:

"'In the case of any alien (other than one to whom sub-section (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation, or (2) suspend deportation of such alien if not racially inadmissible or ineligible to naturalization in the United States if he finds that such deportation would result in serious economic detriment to a citizen or legal resident alien who is the spouse, parent, or minor child of such deportable alien. If the deportation of any alien is suspended under the provisions of this subsection for more than six months, all of the facts and pertinent provisions of law in the case shall be reported to the Congress, with the reasons for such suspension. These reports shall be submitted on the 1st and 15th day of each

calendar month in which the Congress is in session. If during the session of the Congress at which a case is reported, or if a case is reported less than thirty days prior to the close of the session, then during the next session of the Congress, the two Houses do not pass such a resolution, the Attorney General shall cancel deportation proceedings upon the termination of such session except that such proceedings shall not be cancelled in the case of any alien who was not legally admitted for permanent residence at the time of his last entry into the United States, unless such alien pays the Commissioner of Immigration and Naturalization a fee of $18 (which fee shall be deposited in the Treasury of the United States as miscellaneous receipts). Upon the cancellation of such proceedings in any case in which such fee has been paid, the Commissioner shall record the alien's admission for permanent residence as of the date of his last entry into the United States and the Secretary of State shall, if the alien was a quota immigrant at the time of entry and was not charged to the appropriate quota, reduce by one the immigration quota of the country of the alien's nationality as defined in Section 212 of this title, for the fiscal year then current or next following.' (T.R. 9-11.)

"And as further grounds for the aforesaid contentions of plaintiff and in support of the right of plaintiff to remain in the United States of America and to apply for and become a citizen thereof, plaintiff represents and shows to this Honorable Court that plaintiff did not knowingly or wilfully claim exemption from service in the Armed Forces of the United States, but

that plaintiff was classified as 4-C on June 10, 1943, by plaintiff's local draft board by Board No. 72, Emeryville, County of Alameda, State of California, and that plaintiff requested said classification because plaintiff was erroneously and improvidently advised so to do; that plaintiff did not then intend, and never intended, to evade service in the Armed Forces of the United States, or to claim exemption from such service upon any ground whatsoever; and in this behalf plaintiff further alleges that before plaintiff was ever called upon to enlist in, or become a member of the Armed Forces of the United States, plaintiff endeavored to enlist in the United States Navy but was rejected by the recruiting authorities of said Navy upon the ground that plaintiff was an alien; that at a subsequent time plaintiff endeavored to enlist in the said Navy at the United States Navy Recruiting Station, Room 222 in the Post Office Building at Oakland, County of Alameda, State of California, and that plaintiff was then and there informed that plaintiff was ineligible for service in the Navy because of plaintiff's then age; that plaintiff thereafter endeavored to enlist in the Naval Reserve, and was rejected for the same reason, to wit, on account of plaintiff's age; that thereafter and in July, 1950, plaintiff endeavored to enlist in the United States Naval and Marine Corps Reserve at the Training Center thereof at 2144 Clement Avenue, Alameda, California, and was rejected for service therein; that on August 28, 1950, plaintiff endeavored to enlist in the Army and Air Force Recruiting Service and was rejected, upon the ground then and there stated in writing: 'The enlistment requirement for age is 17 to 34 years

without prior service.'; that on October 31, 1950, plaintiff again endeavored to enlist in the United States Navy at the Alameda Training Center and was informed that plaintiff 'could not join until he was a citizen of the United States and must have his papers.'

"And in this behalf plaintiff further shows to this Honorable Court that on 30th day of June, 1944, at a certain hearing conducted at Oakland, California, by the Immigration and Naturalization Service of the United States Department of Justice, on certain deportation proceedings theretofore instituted against plaintiff, the Presiding Inspector, who conducted the said hearing, found of and concerning plaintiff, named therein as respondent, as follows, to wit:

"'(1) That the respondent has reasonably established good moral character for the past five years;

"'(2) That the respondent requested relief from military service as a neutral alien by filing DSS form 301;

"'(3) That the respondent attempted to withdraw his request for relief from military service;

"'(4) That the respondent is unable to withdraw his request for relief from military service as a neutral alien under Section 3(a) of the Selective Service and Training Act;

"'(5) That the deportation of the respondent would result in serious economic detriment to his United States citizen wife and child;

"That thereafter and on the 4th day of August, 1945, the said Presiding Inspector of said Immi-

gration and Naturalization Service of the United States Department of Justice rendered a supplemental opinion and proposed order, which was and is in the words and figures following, to wit:

U. S. Department of Justice
Immigration and Naturalization Service
Oakland, California

Oakland No. 20/4847 Central Office
San Francisco No. 12020/33716 No. 56153/947

"SUPPLEMENTAL OPINION OF THE PRESIDING INSPECTOR

In re: Joao Simoes Barreiro or John S. Barreiro.

"Charges:

Warrant: The Immigration Act of May 26, 1945, in that at the time of entry, he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder.

"Lodged: None

"Proposed Findings of Fact and Proposed Conclusions of Law included in Presiding Inspector's opinion dated June 30, 1944, are adopted.

I.

"Additional Factors Relating to Discretionary Relief

"The respondent's status has not materially changed except for his attempt at withdrawal of his application for exemption from the draft (p. 25 and Ex. 17). A letter from Local Board

No. 2, Emeryville, California, was introduced into the record to more clearly show that such an application was filed (p. 25 and Ex. 18).

"An opportunity was given the respondent by the Selective Service Board to file DSS Form 165, Application for Voluntary Induction, but he declined to do so. An effort was made by the Presiding Inspector to determine his intention and attitude toward filing the application, but he evaded answering the question which was strenuously objected to by the respondent's counsel. Finally, when asked, 'Is it your intention at this time to apply for voluntary induction by applying on form DSS 165?' he answered on advise of his counsel, 'I don't know.' (pp. 26, 27.)

"The Matter of Laborium, 56150/784, is a similar but not parallel case, in that the respondent had no sound reason for requesting relief from military service as a neutral alien, other than his desire to escape that responsibility, and further, that he has not shown any actual willingness to serve in the United States Armed Forces.

"The respondent's counsel endeavored to show by inference and repetition that the respondent was not required by either the Order of the Board of Immigration Appeals, or the Selective Service System to apply for voluntary induction. This allegation is true. At no time has it even been suggested to either the respondent or his counsel that it was necessary for him to file the application.

"Under Section 3(a) of the Selective Training and Service Act, the respondent became ineligible

to citizenship, when he requested relief from military service by filing Form DSS 301, and although he has indicated his desire to withdraw the request, it cannot be withdrawn under the Act. He is therefore inadmissible to the United States under Section 13(c) of the Immigration Act of 1924.

"Since the respondent is not eligible to re-enter nothing could be gained by granting the privilege of voluntary departure and of pre-examination.

II.

"Suspension of Deportation—Proposed Findings of Fact

"Upon the basis of all the evidence presented, it is found:

"(1) That the respondent has reasonably established good moral character for the past five years;

"(2) That the respondent requested relief from military service as a neutral alien by filing DDS form 301;

"(3) That the respondent attempted to withdraw his request for relief from military service;

"(4) That the respondent is unable to withdraw his request for relief from military service as a neutral alien under Section 3(a) of the Selective Service and Training Act;

"(5) That the deportation of the respondent would result in serious economic detriment to his United States citizen wife and child;

"(6) That after full inquiry no facts have been developed which establish that the respond-

ent is deportable on any of the grounds specified in Section 19(d) of the Immigration Act of 1917, as amended;

"(7) That the respondent is ineligible to citizenship under Section 3(a) of the Selective Training and Service Act.

III.

"Suspension of Deportation—Proposed Conclusions of Law

"Upon the basis of the foregoing findings of fact, it is concluded:

"(1) That under Section 19(c)(2) of the Immigration Act of 1917, as amended, the respondent is ineligible for suspension of deportation;

"(2) That under Section 19(c)(1) of the Immigration Act of 1917, as amended, the respondent is eligible for voluntary departure in lieu of deportation but it should not be granted.

IV.

"Proposed Order.

"It is recommended that the alien be deported to Portugal at government expense on the charge stated in the warrant of arrest.

/s/ P. S. Willmore
P. S. Willmore
Presiding Inspector.

PSW:RHF
August 4, 1945.

"That thereafter plaintiff appealed from the said order of deportation to the Board of Immigration Appeals, and on February 9, 1949, the

said Board of Immigration Appeals ordered that the outstanding order and warrant of deportation be withdrawn and that the hearing upon said deportation proceedings be reopened for the purposes set forth in the supplemental opinion hereinafter set forth; that on November 7, 1949, the Presiding Inspector of said Department of Justice at Oakland, California; rendered the following supplemental opinion:

"Supplemental Opinion of the Presiding Inspector

"In re: Joao Simoes Barreiro, alias John S. Barreiro.

"Charges:

"Warrant: The Immigration Act of May 26, 1924, in that, at the time of entry, he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder.

"Lodged: None

"The proposed findings of fact and proposed conclusions of law included in the Presiding Inspector's Opinion dated June 30, 1944, and the supplementary Opinion of the Presiding Inspector dated August 4, 1945, are adopted.

"Synopsis of the Case:

"A warrant for the arrest of the respondent was issued by this Service on September 22, 1943, charging him with violation of the Immigration Act of 1924 in that at the time of his last entry he was an immigrant not in possession of a valid immigration visa and not exempted from the

presentation thereof by said Act or regulations made thereunder. On March 26, 1946, an order was issued granting the respondent the privilege of voluntary departure within six months after notification of decision. The respondent failed to comply with this order and a warrant was issued on February 3, 1947, ordering the respondent deported to Portugal on the charge contained in the warrant of arrest. On February 9, 1949, the Board of Immigration Appeals ordered that the outstanding order and warrant of deportation be withdrawn and that the hearing be reopened to allow the respondent the opportunity to introduce evidence showing that he has a second minor citizen child who is dependent upon him for support, and to establish any economic detriment which would result if he were deported.

I.

"Factors Relating to Discretion Relief

"The hearing in deportation proceedings was reopened on November 1, 1949, at which time the respondent submitted a certified copy of the birth record of Alfred Simoes Barreiro, Exhibit No. 1 of the reopened hearing. Respondent testified that the birth record relates to his blood child (p. 2). He also testified that his marital status has not changed, and no divorce is contemplated. He testified that his wife and his children have no income or assets independent of what he provides. He also testified that he is not employed, but that he derives sufficient income from an apartment house which is free of any encumbrance, and savings which he has, to provide for his family. He places an approximate value on

his real property at $20,000.00 (p. 3). Respondent testified that if he were deported to Portugal he would lose some money through the sale of his property (p. 4). On November 2, 1949, the day after the reopened hearing, the respondent appeared at the Immigration Office in Oakland, California, and presented a list of bonds which amount to $1,750.00 face value; this list of bonds is attached to the record of hearing.

"Respondent testified that the only arrest he has against him was a traffic violation for which he paid a $3.00 or $5.00 fine (p. 4).

"Respondent's wife testified that the birth record which has been entered into the record of the reopened hearing as Exhibit No. 1, relates to her blood child (p. 5). She also testified that if her husband were deported it would cause an economic detriment to her and her children (p. 6).

"Since the hearing was reopened for the purpose of introducing additional evidence of an economic detriment, a fact which has already been established, and no other new and material evidence was submitted by the respondent, the opinion and recommendation in the Opinion of the Presiding Inspector dated June 30, 1944, and Supplemental Opinion of the Presiding Inspector dated August 4, 1945, are hereby adopted.

"/s/ Walter O. Bostwick,
Presiding Inspector.

"12020/33716
"November 7, 1949.

"That plaintiff has exhausted each and every administrative remedy provided by law in the premises; but the said defendant, notwithstanding

the premises, contends and maintains that plaintiff is liable to be deported from the United States of America upon the aforesaid grounds assigned for such deportation; that plaintiff is now free and at large, but the said defendant, by and through his subordinate officers, threatens to have plaintiff arrested upon a deportation warrant and deported from the United States; that plaintiff contends that it has been erroneously held by the said Inspectors that plaintiff could not withdraw the said claim of exemption from military service and that it has been erroneously held and is erroneously claimed by defendant that plaintiff is not eligible to suspension of deportation and is ineligible for citizenship in the United States of America.

"Wherefore, plaintiff prays for a declaratory judgment of this Honorable Court adjudging and declaring that plaintiff is eligible for suspension of deportation, pursuant to the provisions of the statute hereinabove set forth and the other laws of the United States, and that plaintiff is eligible to apply for and obtain citizenship in the United States, and for such other and further relief as to this Honorable Court shall seem meet, just and proper in the premises."

The answer virtually admits all of the essential facts pleaded in the complaint, but pleads the following affirmative defenses:

"First Affirmative Defense

"Defendant asserts that when plaintiff filed DSS Form 301 and thereupon was classified as IV-C on June 10, 1943, by plaintiff's Local Draft

Board No. 72, Emeryville, County of Alameda, State of California, he then became ineligible for citizenship in the United States pursuant to 50 U.S.C.A. App. 303 (a) which reads as follows:

'Except as otherwise provided in this Act, every male citizen of the United States and every other male person residing in the United States, who is between the ages of 18 and 45 at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States; Provided, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act, if, prior to his induction into the land or naval forces he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, **but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States** * * *.' (Emphasis supplied.)

"The pertinent regulation concerning the above statute is found in 50 C.F.R. 622.43 which reads in part as follows:

" 'In Class IV-C shall be placed any registrant * * * (b) who is an alien and who is a citizen or subject of a neutral country and who, at any time prior to (1) his induction into the land or naval forces of the United States * * * files with his Local Board an application by alien for relief from military service (Form 301), executed in duplicate * * *.'

"Therefore, defendant affirmatively asserts that the plaintiff is mandatorily prevented from re-

ceiving the benefits of suspension of deportation as provided in 8 U.S.C. 155 (c), which specifically provides that those persons not eligible for citizenship may not be considered for such discretionary relief. 8 U.S. 155 (c) as amended reads as follows:

" '(c) In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States for any country of his choice at his own expense, in lieu of deportation; or (2) **suspend such deportation of such alien if he is not ineligible for naturalization or if ineligible such ineligibility is solely by reason of his race,** if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; * * *.' (Emphasis supplied.)

"Second Affirmative Defense

"Defendant asserts that the plaintiff is properly subject to deportation as being an alien having entered the United States on April 22, 1930, without an immigration visa for permanent residence. The pertinent statute requiring such visa is 8 U.S.C. 213 (a) which reads as follows:

'No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa.'

"Third Affirmative Defense

"Defendant asserts that on the basis of the foregoing statutes, of which the court may take judicial notice, and upon the facts stated by plaintiff in his complaint, plaintiff has failed to state a cause of action upon which relief may be granted, and such complaint is subject to dismissal as provided in Rule 12(b) (6) of the Federal Rules of Civil Procedure." (T.R. 26-28.)

(2) The order of the Appeal Board of the Department of Justice permitting appellant to withdraw his claim of exemption.

After the original recommendation of the Presiding Inspector at San Francisco, following a hearing under the warrant of arrest, that the plaintiff was subject to deportation and recommending his deportation to Portugal, appellant appealed to the Attorney General, and on March 28, 1945 the Department of Justice made the following order:

"It is ordered that final decision on the alien's application for suspension of deportation be deferred for sixty days for the purpose of giving him an opportunity **to withdraw his application for exemption** from the draft. In the event form 301 is withdrawn the case is to be reopened to permit him to show that he no longer claims exemption from military service on account of alienage."

In obedience to this order of the Department of Justice, the plaintiff, under date of April 27, 1945, addressed the following communication to the United States Department of Justice, Immigration and

Naturalization Service, 213 Post Office Building, Oakland, California:

"Dear Sirs:

"I have today forwarded by registered mail to Local Board No. 72, Town Hall, Park Avenue and Hollis Street, Emeryville 8, California, the enclosed withdrawal of claim of exemption on the ground that I am an alien. I expressly withdraw from 301 unqualifiedly and unreservedly.

"Very truly yours,
John S. Barreiro" (T.R. 128)

On the same date, plaintiff addressed the following communication to his local Selective Service Board, No. 72:

"I, John S. Barreiro, 33 years of age, born June 15, 1911, bearing order No. 1875, and being under the jurisdiction of your Local Board 72 of Alameda County, do hereby state and declare that I hereby withdraw of the claim for exemption from the Selective Service Act on the ground that I am an alien and not a citizen of the United States.

"In witness whereof I have hereunto set my hand this 27 day of April, 1945.

John S. Barreiro".

On April 28, 1945 the local board of Alameda County addressed the following communication to appellant:

"John Simoes Barreiro, 1723-16th Avenue, Oakland, California.

"Your order No. 1875.

"Dear Sir: This will acknowledge receipt of your notarized statement dated April 27, 1945, in which you state you are withdrawing all claim for exemption from the Selective Service Act on the ground that you are an alien and not a citizen of the United States.

"We quote the following from Regulations: (8)

" 'Even though a neutral alien has filed a DSS form 301, he may volunteer for induction by filing with his local board an application for voluntary induction in duplicate. The application for relief from military service (Form 301) may not be actually withdrawn from the files as it is a part of Selective Service records. The effect of the DSS form 301 being on file is a matter for the courts to determine, and even though a person who has filed DSS form 301 volunteers for induction, and is inducted, the courts may hold that such persons cannot become citizens. In order that there may be no misunderstanding on the part of a person who volunteers for induction under these circumstances, it is suggested that the Application for Voluntary Induction have typed upon its face, prior to the signature, the following:

" 'I have formerly filed an Application by Alien for Relief from Military Service (Form 301) but I am volunteering for induction and service in the armed forces of the United States in spite of such former application for relief from such service. In doing so, I understand

that the effect to be given to my former application for relief from military service is a matter which (9) must be determined by the courts.'

"If it is still your desire to apply for voluntary induction, please return the two copies of DSS form 165 which were given to you at the time you were last in this office. Be sure that you sign both forms.

"Very truly yours,
"Local Board No. 72,
"Emeryville, California.
"Lillian Holland,
Clerk."

(T.R. 129-130.)

The numerous but futile attempts of appellant to enlist in various branches of the armed forces of the United States, both before and after the withdrawal of his claim of exemption, are set forth in paragraph IV of the complaint (T.R. 11-13), which we have heretofore set forth, and which need not be repeated. They were testified to in detail by the appellant upon the trial. (T.R. 146-151.)

(3) A former order of the District Court in habeas corpus proceedings.

After plaintiff had taken an appeal from the deportation order to the Immigration Appeals Board, and after the order of the Department of Justice of March 28, 1945, and the subsequent order of the Presiding Inspector made on August 4, 1945, and certain other proceedings which need not be related in detail, appellant applied to the United States Dis-

trict Court for the Northern District of California for a writ of habeas corpus (No. 27563H), which came on to be heard before Honorable George B. Harris, United States District Judge. On October 6, 1948, Judge Harris made the following order:

> "Upon reargument of the above-entitled matter, it was stipulated by the parties that further hearing before the Immigration and Naturalization Service was required for a proper determination.
>
> "Accordingly, it is ordered that the matter be and the same hereby is remanded to the Immigration and Naturalization Service, Department of Justice.
>
> "Dated: October 6, 1948."

Accordingly, another hearing was had before the Presiding Inspector of the Department of Justice at Oakland, California, who, on November 7, 1949, rendered the opinion set forth in the complaint. (T.R. 18-21.)

All of the foregoing matters were established by uncontradicted evidence.

(4) The findings made by the District Court.

On March 12, 1953, Honorable Michael J. Roche, United States District Judge who heard the above entitled cause, made the following findings of fact and conclusions of law:

"Findings of Fact

"Plaintiff is a 41-year-old native and citizen of Portugal who last entered the United States

at Jersey City, New Jersey, on April 22, 1930, as a stowaway aboard the S.S. 'Anaconda.'

"On October 16, 1940, in Alameda County, California, plaintiff registered under the Selective Training and Service Act of 1940 and in September, 1942, was classified 1A by his local Draft Board.

"Subsequent to September, 1942, plaintiff voluntarily executed and filed D.S.S. Form 301 claiming exemption from military service as a neutral alien, and on June 10, 1943, was reclassified by the Draft Board to Class IV-C.

"Plaintiff has never served in the armed forces of the United States.

"Conclusions of Law

"That the plaintiff Joao Simoes Barreiro is statutorily ineligible for suspension of deportation under the provisions of Title 8 U.S.C. 155.

"That the plaintiff, Joao Simoes Barrerio is debarred from becoming a citizen of the United States.

"Let Judgment be entered accordingly."

(T.R. 112, 113.)

(5) The judgment.

In accordance with the foregoing purported findings, the District Court on March 13, 1953 entered the following judgment:

"That plaintiff having voluntarily claimed exemption from military service on the ground that he was a neutral alien and having received such classification from his local Draft Board, he is

therefore statutorily ineligible for suspension of deportation pursuant to the provisions of Title 8 U.S.C. § 155 and is debarred from becoming a citizen of the United States."

(6) The proceedings subsequent to judgment.

Thereafter, on March 19, 1953, plaintiff moved the Court to substitute Honorable Herbert Brownell, Jr., Attorney General of the United States, as defendant in place and stead of Honorable James P. McGranery, pursuant to subdivision (d) of rule 25 of the Rules of Federal Procedure. On March 20, 1953 plaintiff filed a motion for a new trial "on all the grounds on which rehearings have heretofore been granted in suits in equity in courts of the United States, and on the ground that the said judgment is not supported by the evidence, and on the ground that the findings are contrary to the evidence, and on the ground that the judgment is not consonant with the principles of equity, and on the ground that it is contrary to law." (T.R. 116.)

On the same day appellant filed a motion to amend, change, alter and substitute findings upon the ground "That the said findings fail to determine an issue in the case, to wit: That the plaintiff in the above-entitled action was ordered, directed and required by the Immigration Department and the Appeal Board to withdraw his claim of exemption and did so promptly and in writing and in every respect endeavored to comply with the decision of the Appeal Board in his immigration case, and that, therefore, the find-

ings should rule upon this material issue presented in this case, and fails to do so."

On May 13, 1953 the district judge made an order substituting Mr. Brownell as defendant in the place of Mr. McGranery, and on May 14, 1953 denied the motions for a new trial and to amend and substitute the findings. (T.R. 119.)

On June 4, 1953, petitioner duly appealed to the United States Court of Appeals for the Ninth Circuit which, on September 13, 1953, as heretofore stated, rendered the opinion hereunto annexed.

(7) The basis for federal jurisdiction in the Court of first instance.

U.S.C.A. Title 28, Section 2101.

ARGUMENT OF THE CASE.

I.

THE RIGHT OF THE PLAINTIFF TO WITHDRAW HIS CLAIM OF EXEMPTION HAS BEEN CLEARLY SETTLED BY THE SUPREME COURT OF THE UNITED STATES.

Before proceeding to cite the authorities upon the one issue of law in this case which has been before the courts for these many years and upon which no final decision has yet been reached, we desire to call the attention of the Court to the fact that the Department of Justice which is now opposing plaintiff in his efforts to remain in this, the country of his adoption, and which is seeking his deportation upon the sole ground that he claimed exemption from military service, has completely reversed one of its own

prior decisions, and has ignored the fact that it has heretofore held that plaintiff was entitled to withdraw his claim and directed him to do so.

We have heretofore set forth the order of the Department of Justice deferring the final decision on plaintiff's application for suspension of deportation "for the purpose of giving him an opportunity to withdraw his application for exemption from the draft."

We have further set forth the communications of appellant to the Department of Justice and to his local Selective Service Board withdrawing his claim of exemption.

Notwithstanding the prompt compliance of plaintiff with the order of the Department of Justice, the local draft board refused to accept the withdrawal of the claim.

The numerous and repeated, but futile efforts of plaintiff to enlist in the Army, the Navy, the Marine Corps and the Coast Guard are set forth in the complaint on file in this action. As to these facts, there is no dispute. It is likewise undisputed, and is, indeed, specifically found by the Immigration Board in several sets of findings, that the plaintiff has acquired property in this country, that he has in no particular violated any of our laws, saving some inconsequential instances in which he has received traffic tags, and that his deportation would result in serious economic detriment to his wife and children, all of whom are citizens of the United States. He is, therefore, clearly a sub-

ject for relief under the humane provisions of the Dies Bill. (U.S.C.A., Title 8, Sec. 155, Subd. (c), as amended in 1942.)

The complaint presents a case which, we submit, should appeal profoundly to the conscience of a court of equity. The unfortunate situation in which plaintiff is placed, through no fault of his own, and the cruel injustice that would result from a construction of the statute by the letter that killeth, rather than by the spirit that giveth life,—these matters are so patent that he who runs may read.

We shall confine ourselves, therefore, to a discussion of the decisions which decisively refute the claim of the defendant that the execution by plaintiff of the claim of exemption, regardless of motive, good faith or mistake, was an irrevocable act, from the consequences of which there can be no relief.

We submit that no such cruel and inhuman consequences were even intended by the Congress. The humanitarian provisions of the Dies Bill alone are sufficient to negative any such intention, and it is a fundamental rule of statutory construction that the Courts, unless manifestly compelled so to do, will not so construe a statute as to achieve an unjust or absurd result.

It must be borne in mind that an action for declaratory relief is essentially an equitable remedy, and that the Court in such cases is guided by equitable principles. We may add that declaratory judgments, though provided for by various statutes, are not with-

out their counterpart in the practice of the high court of chancery, and find their analogy in bills *quia timet.* Thus it has been held by the late District Judge Erskine that in such cases there is no right to a trial by jury.

Chin Fook v. McGrath, 92 Fed. Supp. 614.

It has been well said by the Supreme Court of Wyoming in *Holly Sugar Corp. v. Fritzler,* 42 Wyo. 446, 296 Pac. 206:

> "Whatever it be, a new right has been granted, and this right, now a legal right under the law, is equitable in nature by reason of the fact that actions brought pursuant thereto are in the nature of bills of peace."

The District Courts of the United States derive their jurisdiction under the declaratory judgment act from the provision of the Constitution which grants to them jurisdiction in law and equity of cases arising under the Constitution and laws of the United States.

Automotive Equipment v. Trico Products Corp., 11 Fed. Supp. 292.

Release by declaratory judgment "is only a kind of expanded bill *quia timet,* meant to do in general what that suit did in its limited field."

Meeker v. Baxter (C.C.A. N.Y.), 83 Fed. (2d) 183.

The declaratory relief act only provides a new form of procedure for adjudication of rights in conformity with established equitable principles.

Caven v. Clark, 78 Fed. Supp. 295.

The underlying principle of the declaratory judgment is in equity.

Crosley Corp. v. Westinghouse Electric & Mfg. Co., 43 Fed. Supp. 690.

The remedy of declaratory relief, while created by statute, is based largely on equitable considerations.

Lumbermen's Mutual Casualty Co. v. McEiver (D.C. Col. 1939), 27 Fed. Supp. 702.

Since, then, the present action must be determined in accordance with equitable principles, we submit that it is too clear to admit of any question that a federal Court, as a court of equity, possesses the power possessed by such courts from time immemorial to relieve against the consequences of a mistake, either of law or of fact. The jurisdiction of equity to relieve against the consequences of a mistake has been exercised from an early period and is thoroughly established, in some states being expressly conferred by statute. Story defines mistakes as "some unintentional act or omission or error arising from ignorance, surprise, imposition or misplaced confidence." (1 *Story Eq. Jur.*, Sec. 156.)

It is thus defined in *Bispham on Equity*, Section 185:

> "A mistake exists when a person, under some erroneous conviction of law or fact, does or omits to do some act which, but for the erroneous conviction, he would not have done or omitted. It may arise either from unconsciousness, ignorance, forgetfulness, imposition or misplaced confidence."

The power to relieve against mistakes of law, as well as mistakes of fact, is well settled.

> "A mistake of law is something that operates upon the mind and induces action in reliance upon what the party acting believes, or supposes, to be his legal rights. It is an act done or suffered under a misapprehension of legal rights, and is necessarily based upon his ignorance of what his legal rights are."

Macklem v. Bacon, 57 Mich. 334, 342, 24 N.W. 191.

It has been said by this Court that "the term may mean the ignorance or error of a particular person with respect to his own legal rights and interests which are affected by or which result from a certain transaction in which he engages."

Houston v. Northern Pacific R. R. Co., 231 U.S. 181, 34 S. Ct. 113, 58 L. Ed. 176.

Equity always relieves against a mistake of law when the surrounding facts raise an independent equity.

Winget v. Rockwood (C.C.A. 8), 69 Fed. (2d) 326.

It has been well said by the Circuit Court of Appeals of the Second Circuit that equitable relief may be had where mistake as to plaintiff's legal rights is induced by misrepresentations, even though innocently made, if it is reasonable for plaintiff to rely upon presumably greater knowledge of defendant.

Staten Island Hygeia Ice Co. v. United States, 85 Fed. (2d) 68.

The foregoing decisions should be sufficient to demonstrate that the District Court should have relieved the plaintiff of the dire consequences which have ensued from his ill-advised claim of exemption, which he filed in reliance upon the advice of his draft board, and that the Court of Appeals has erred in its affirmance of the District Court.

On April 9, 1951, this Court, reversing an order of the Court of Appeals for the Second Circuit, which had reversed an order of the District Court for the Eastern District of New York which admitted petitioner to citizenship, settled the one question here involved beyond all cavil.

Moser v. United States, 341 U.S. 41, 71 S. Ct. 553, 95 L. Ed. 729.

In that case, it was held that a Swiss citizen who applied for exemption from military service as a neutral alien was not debarred from becoming an American citizen, where his application for exemption did not contain a waiver of the signer's right of citizenship and which he signed only after the Swiss Legation had advised him that he did not thereby waive his right to apply for American citizenship. In the unanimous judgment of this Court, it is said:

> "Petitioner had sought information and guidance from the highest authority to which he could turn, and was advised to sign Revised Form 301. He was led to believe that he would not thereby lose his rights to citizenship. If he had known otherwise he would not have claimed exemption. In justifiable reliance on this advice he signed the papers sent to him by the Legation. * * *

> "Petitioner **did not knowingly and intentionally waive his rights to citizenship. In fact, because** of the misleading circumstances of this case, he never had an opportunity to make an intelligent election between the diametrically opposed courses required as a matter of strict law. Considering all the circumstances of the case, we think that to bar petitioner, **nothing less than an intelligent waiver is required by elementary fairness.**"

In *Machado v. McGrath,* 193 Fed. (2d) 706, the *Moser* case is cited with approval, and the Court of Appeals adds:

> "As in the *Moser* case, we believe Machado was entitled to have the 'opportunity to make an intelligent election' **between being subject to the draft on the one hand, and being exempt but losing a right to become a citizen on the other.** See: *Johnson v. United States,* 318 U.S. 189, 63 S. Ct. 549, 87 L. Ed. 701. The sound reason for affording such an opportunity arises in good part from our conviction that American citizenship being a most precious right, its denial should not be allowed to rest upon a doubtful premise."

That decision of this high Court disposes of the one question involved. Plaintiff is clearly entitled to relief from the consequences of a claim improvidently signed in reliance upon the advice of his draft board, without being advised as to the legal consequence of the claim that he would be thereafter debarred from citizenship. The strict letter of the statute must yield to avoid captious interpretations (*Delgadilla v. Carmichael,* 332 U.S. 338, 68 S. Ct. 10, 92 L. Ed. 17), and

to avoid injustice. (*Church of the Holy Trinity v. United States,* 143 U.S. 457, 12 S. Ct. 511, 36 L. Ed. 226.) Where, as here, a penalty is imposed, the statute should be liberally construed to avoid the imposition of the penalty. (*Fong Haw Tan v. Phelan,* 333 U.S. 6, 68 S. Ct. 374, 92 L. Ed. 433.)

The eloquent language of Justice Douglas, reversing a judgment of the Circuit Court of Appeals affirming a judgment of the District Court denying a writ of habeas corpus, is well worthy of quotation:

> "We resolve the doubts in favor of that construction **because deportation is a drastic measure and at times the equivalent of banishment or exile.** It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."
>
> *Fong Haw Tan v. Phelan,* 333 U.S. 6, 68 S.Ct. 374, 92 L. Ed. 433.

In *Delgadilla v. Carmichael, supra,* decided at the same term, Justice Douglas, again delivering the unanimous opinion of this Court, says:

> "Respect for law does not thrive on captious interpretations. Deportation can be the equivalent of banishment or exile. See *Bridges v. Wixon,* 326 U. S. 135, 147, 65 S. Ct. 1443, 89 L. Ed. 2103, 2111. The stakes are indeed high and

momentous for an alien who has acquired his residence here. We will not attribute to congress a purpose to make his right to remain here dependent on circumstances so fortuitous and capricious as those upon which the Immigration Service has here seized. The hazards to which we are now asked to subject the alien are too irrational to square with the statutory scheme."

We submit that there can be no answer to these decisions, not one of which is even mentioned in the opinion of the Court of Appeals.

II.

THE JUDGMENT OF THE DISTRICT COURT SHOULD HAVE BEEN REVERSED FOR THE FAILURE TO FIND ON THE MATERIAL ALLEGATIONS OF FACT IN PLAINTIFF'S COMPLAINT.

Under the plain provisions of Rule 52a of the Federal Rules of Procedure, the District Court should have found the facts specially, particularly upon the allegations that petitioner was laboring under a mistake when he filed the claim of exemption, that he attempted to withdraw the said claim at the direction of appellee's predecessor in office, and that he made numerous and unsuccessful attempts to enlist in the Armed Forces of the United States. We shall not, however, discuss this question *in extenso* in view of what, we submit, is the palpable error of the Court of Appeals in ordering the action dismissed for failure to state a claim upon which relief can be granted.

Wherefore your petitioner prays that a writ of certiorari issue out of this Honorable Court under the seal thereof to the United States Court of Appeals for the Ninth Circuit, commanding it to certify and send to this Honorable Court the transcript of the record and proceedings in the cause numbered and entitled as above, that the same may be reviewed by this Honorable Court, and that your Honors may cause to be done therein to correct the aforesaid errors what of right and, according to the laws and customs of the United States, ought to be done.

Dated, San Francisco, California,
October 1, 1954.

JOAO SIMOES BARREIRO,
Petitioner in Propria Persona.

JOSEPH A. BROWN,
Of Counsel.

CERTIFICATE.

I hereby certify that I am the petitioner in the above entitled cause and that in my judgment the foregoing petition is well founded, in point of law as well as in fact, and that said petition is not interposed for cause of delay.

Dated, San Francisco, California,
October 1, 1954.

JOAO SIMOES BARREIRO,
Petitioner.

(Appendix Follows.)

Appendix

United States Court of Appeals
for the Ninth Circuit

Joao Simoes Barreiro, Appellant, vs. Herbert Brownell, Jr., Attorney General of the United States, Appellee.	No. 13,863 Sep. 13, 1954

Appeal from the United States District Court
for the Northern District of California,
Southern Division.

Before Mathews, Bone and Chambers, Circuit Judges.
Mathews, Circuit Judge.

On September 28, 1951, in the United States District Court for the Northern District of California, appellant, Joao Simoes Barreiro, a deportable alien, commenced an action against J. Howard McGrath, the then Attorney General of the United States,[1] for a judgment declaring that appellant was eligible for suspension of deportation. The Attorney General an-

[1]McGrath's successor, James P. McGranery, was substituted for McGrath on November 10, 1952. McGranery's successor, Herbert Brownell, Jr., was substituted for McGranery on May 13, 1953.

swered, a trial was had, an opinion[2] was filed, and on March 13, 1953, a judgment was entered declaring that appellant was ineligible for suspension of deportation. This appeal is from that judgment.

The action was purportedly based on 8 U.S.C.A. § 155(c), 62 Stat. 1206,[3] which provided that, with inapplicable exceptions: "In the case of any alien * * * who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may * * * suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and [was in the United States on May 1, 1917]. * * *"

The answer pleaded three defenses, one of which was that the complaint failed to state a claim upon

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[2]Barreiro v. McGrath, D.C.N.D. Cal., 108 F. Supp. 685.

[3]Section 155(c) was repealed by § 403(a) of the Immigration and Nationality Act, 66 Stat. 279, effective December 24, 1952. However, this action, having been commenced before December 24, 1952, was not affected by the repeal. See § 405(a) of the Immigration and Nationality Act, 66 Stat. 280. The subject matter of § 155(c) is now covered by 8 U.S.C.A. § 1254, 66 Stat. 214.

which relief could be granted.[4] That defense will now be considered.

I

It appeared from the complaint that appellant was born in Portugal in 1911; that he entered the United States in 1930 and resided in the United States at all times thereafter; that on September 22, 1943, a warrant for his arrest was issued by the Immigration and Naturalization Service; that he was given a hearing on June 30, 1944; and that on August 4, 1945, the hearing officer (Immigrant Inspector P. S. Willmore) decided that appellant was deportable, was ineligible for suspension of deportation and should be deported.

It appeared from the complaint that appellant appealed to the Board of Immigration Appeals from Inspector Willmore's decision, and that the Board, on February 9, 1949, ordered the hearing reopened and ordered that appellant be permitted to adduce further evidence as to his eligibility for suspension of deportation.

It appeared from the complaint that the hearing was reopened on November 1, 1949; that appellant was then permitted to, and did, adduce further evidence as to his eligibility for suspension of deportation; and that on November 7, 1949, the hearing officer (Immigrant Inspector Walter O. Bostwick) decided that

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[4]See Rule 12(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A.

appellant was ineligible for suspension of deportation and should be deported. It did not appear from the complaint that any appeal was ever taken from Inspector Bostwick's decision.

The complaint stated that appellant had "exhausted each and every administrative remedy provided by law in the premises." That, however, was a mere statement of a conclusion. The complaint did not state any fact or facts warranting the conclusion. There was an administrative remedy which appellant could have invoked by appealing to the Board of Immigration Appeals from Inspector Bostwick's decision; but, as indicated above, that remedy did not appear to have been invoked.

II

No alien was eligible for suspension of deportation under § 155(c) unless he was eligible for naturalization or was ineligible for naturalization solely by reason of his race. It did not appear from the complaint that appellant was eligible for naturalization or was ineligible for naturalization solely by reason of his race. Instead, it appeared from the complaint that on June 10, 1943, appellant applied to be, and was, relieved from liability for training and service under the selective Training and Service Act of 1940, as amended,[5] and was thereby debarred from becoming

[5] See 50 U.S.C.A. Appendix, 1946 Edition, § 301 et seq.; 50 U.S.C.A. Appendix, 1952 Edition, § 451 et seq.

a citizen of the United States.[6] Thus it appeared from the complaint that appellant was ineligible for naturalization, not by reason of his race, but by reason of the application above mentioned, and was therefore ineligible for suspension of deportation.

III

The power vested in the Attorney General by § 155(c) was a discretionary power. Hence the Attorney General would not have been required to suspend appellant's deportation, even if appellant had alleged and proved, and had obtained a judgment declaring, that he was eligible for such suspension.

We conclude that the complaint failed to state a claim upon which relief could be granted.

Accordingly, the judgment is modified so as to dismiss the action for failure of the complaint to state such a claim and, as thus modified, is affirmed.

(Endorsed:) Opinion. Filed Sep. 13, 1954. Paul P. O'Brien, Clerk.

[6]See § 3(a) of the Selective Training and Service Act of 1940, as amended; 50 U.S.C.A. Appendix, 1946 Edition, § 303(a); 50 U.S.C.A. Appendix, 1952 Edition, § 454(a).

United States Court of Appeals
for the Ninth Circuit

Joao Simoes Barreiro, Appellant, vs. Herbert Brownell, Jr., Attorney General of the United States, Appellee.	No. 13,863

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is modified so as to dismiss the action for failure of the complaint to state such a claim and, as thus modified be, and hereby is affirmed.

(Endorsed:) Judgment filed and entered September 13, 1954. Paul P. O'Brien, Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 382

JOAO SIMOES BARREIRO, PETITIONER

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 172–175; Pet. App. i–v) has not yet been reported. The opinion of the District Court (R. 103–111) is reported at 108 F. Supp. 685.

JURISDICTION

The judgment of the Court of Appeals was entered on September 13, 1954 (R. 176, Pet. App. vi), and a petition for a rehearing was denied on September 23, 1954 (R. 177). The petition for a writ of certiorari was filed on October 4, 1954.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Petitioner, a citizen of Portugal, illegally entered the country as a stowaway in 1930. In 1943, after he had been classified I–A in the draft and just before he received his orders to report for induction into the armed forces, petitioner applied for and was granted relief from military service as a neutral alien. Section 3 (a) of the Selective Training and Service Act, 54 Stat. 885, *et seq*, as amended, 55 Stat. 845, 50 U. S. C. App. (1946 ed.) 303, provided that any person who makes such an application "shall thereafter be debarred from becoming a citizen of the United States." Petitioner, who read, spoke and understood English, admitted having read the standard alien application form for relief from United States military service before he had signed it. This form contained a specific statement that by making the application petitioner could not thereafter become a citizen.[1] On April 27, 1945, petitioner re-

[1] The prescribed DSS Form 301, which petitioner signed (R. 63), after a printed recitation of a request for relief "from liability for training and service in the land or naval forces of the United States", contained the following printed statement above the line for registrant's signature: "I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States." See Selective Service Form 301 (16-26414-1). This case does *not* involve the Revised Form 301, which was used in *Moser* v. *United States*, 341 U. S. 41.

quested permission to withdraw his application for relief from service, which request was denied. The questions presented are:

1. Whether petitioner has stated a claim entitling him to a declaration that he is eligible for naturalization, where he alleged that he requested exemption from military service as a neutral alien because he "was erroneously and improvidently advised so to do."

2. Whether the District Court erroneously found, on the basis of the evidence adduced at the trial, that petitioner had voluntarily applied for exemption from military service as a neutral alien, with his "only error * * * a lack of foresight * * * that his attitude might change when World War II had ended."

STATUTES AND REGULATION INVOLVED

Section 3 (a) of the Selective Training and Service Act of September 16, 1940, 54 Stat. 885, as amended, 55 Stat. 845, 50 U. S. C. App. (1946 ed.) 303 (a), provided in pertinent part as follows:

> Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States [within specified age limits] shall be liable for training and service in the land or naval forces of the United States: *Provided*, That any citi-

> zen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States * * *.

Selective Service Regulation 622.43 (32 C. F. R. [1943 Cum. Supp.] 622.43) provided in pertinent part:

> *Neutral aliens requesting relief from training and service* * * *.
>
> * * * * * *
>
> (b) When an alien registrant who is a citizen or subject of a neutral country (see § 601.2) at any time prior to his induction into the land or naval forces of the United States files with his local board an Application by Alien for Relief from Military Service (Form 301) executed in duplicate, he shall be placed in Class IV–C. * * *

Section 19 (c) of the Immigration Act of 1917, 39 Stat. 889, as amended, 54 Stat. 672, 8 U. S. C. (1946 ed.) 155 (c), provided in pertinent part:

> In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral

character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation, or (2) suspend deportation of such alien if not racially inadmissible or ineligible to naturalization in the United States if he finds that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien. * * *

STATEMENT

On September 28, 1951, petitioner, a citizen of Portugal, began an action in the District Court for the Northern District of California, in which he sought a declaratory judgment that he was (a) eligible for suspension of deportation within the provisions of Section 19 (c) of the Immigration Act of 1917, as amended,[2] and (b) eligible to apply for citizenship (R. 6–22). Prior to the commencement of this action, the Department of Justice had begun deportation pro-

[2] Section 19 (c) of the Immigration Act of 1917, 39 Stat. 889, as amended, 54 Stat. 672, 8 U. S. C. (1946 ed.) 155 (c), was repealed by the Immigration and Nationality Act, 66 Stat. 163, 279, effective December 24, 1952. However, the action in the instant case, which was instituted before the repeal date, is not affected by the repeal. See Section 405 (a) of the Immigration and Nationality Act, 66 Stat. at 280, 8 U. S. C. 1101 note. The subject matter of section 19 (c) is now covered by Section 244 (a), 66 Stat. at 214, 8 U. S. C. 1254.

ceedings against petitioner, based upon his illegal entry in 1930 as a stowaway (R. 39, 70–78). Petitioner's application for suspension of deportation was rejected, following a series of hearings (R. 31–36, 38–70, 78–88, 88–98), on the ground that he was ineligible for citizenship because, in 1943, he had requested and been granted, as a neutral alien, a claimed exemption from service in the armed forces (R. 70–78; 14–17; 18–21; 25).

In his complaint, petitioner contended that he was not disqualified from becoming an American citizen by reason of having requested the exemption, since, as he alleged, he "did not knowingly or willfully claim exemption from service", but had only "requested" such exempt status because he had been "erroneously and improvidently advised so to do" (R. 11). He further alleged that he had unsuccessfully attempted to withdraw his application for relief from military service, and that he had never intended to evade military service, but had been refused enlistment, both due to his alienage before he applied for his draft exemption and due to being overage when he made subsequent attempts to enlist (principally in 1950), after his deportation had been ordered (R. 11–13).

In its answer, the Government pleaded, *inter alia*, that upon the facts alleged in the complaint petitioner failed to state a cause of action upon which relief could be granted (R. 28–29).

At the District Court hearing on the merits, before Chief Judge Roche, the evidence consisted largely of petitioner's own testimony and stipulated facts and transcripts of the deportation proceedings (R. 30–100; 123–164). The following facts were undisputed:

Petitioner had illegally entered the United States as a stowaway in 1930, when he was eighteen years old (R. 32–34). He has since resided in this country (R. 33). On May 9, 1941, he was classified IV–C by his local draft board (R. 44, 62–63, 125). Early in September 1942, petitioner was reclassified to I–A, and shortly thereafter, on September 12, 1942, he married an American citizen, who gave birth to their first of two children on September 24, 1942 (R. 35, 50, 60, 63, 125, 132). Petitioner unsuccessfully appealed from his I–A classification (R. 63) and unsuccessfully sought deferment on grounds of marital status and employment (R. 63–65). In January 1943, he received notice of his acceptability for the Army. Petitioner then filed with his local board DSS Form 301, claiming exemption from military service as a neutral alien (R. 63–65). Petitioner, who could read, write, and speak English and who had had a high school education in Portugal (R. 34, 38, 88, 147), testified that he had read and signed this form after having a notary fill it out for him (R. 63–64, 162). Thereupon petitioner's induction notice was canceled and he was given the

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IV–C draft classification which he had requested. As already shown (*supra*, p. 2, fn. 1), this form specifically informed petitioner that by claiming the exemption he was waiving his rights to future citizenship.

On September 22, 1943, deportation proceedings were commenced against him on the basis of his illegal entry (R. 18)[3] and several hearings were held (R. 31–36, 38–70, 78–88, 88–98). On the basis of petitioner's evidence, it was determined that petitioner was of good moral character and that his deportation would result in serious economic detriment to his family (R. 77). However, the hearing officer concluded that petitioner had lost his right to become a citizen, under Section 3 (a) of the Selective Training and Service Act of 1940, as amended, by reason of his claim for exemption from service, and that he had thus become ineligible for relief under Section 19 (c) of the Immigration Act of 1917, as amended (R. 16–17).

On April 27, 1945, after the Board of Immigration Appeals had deferred action on petitioner's application for relief and ordered his deportation proceedings reopened in order to afford him an opportunity to withdraw his DSS Form 301 from

[3] Petitioner incorrectly states (Pet. 30) that the deportation proceedings are based upon petitioner's claim of exemption from military service. Under the statute, this claim made him ineligible for naturalization, and thus ineligible for suspension of deportation.

the local draft board, petitioner sent his local board a letter withdrawing his prior claim to exemption as an alien (R. 79, 132, 80, 133–134; Pet. 24). The local board, in its letter acknowledging receipt of petitioner's statement of withdrawal, quoted from Selective Service Regulations, which, although providing that Form 301 "may not be actually withdrawn from the files as it is a part of Selective Service records", allowed an alien who had filed this form to volunteer for induction by filing DSS Form 165 (Application for Voluntary Induction), with the stipulation that "the effect of the DSS form 301 being on file is a matter for the courts to determine" (R. 129–130, 159–160). In conclusion the letter stated: "If it is still your desire to apply for voluntary induction, please return the two copies of DSS form 165 which were given you at the time you were last in this office. Be sure that you sign both forms" (R. 130). Petitioner never executed Form 165 (R. 81, 131).[4]

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[4] When asked, at the reopened deportation hearing, if he would file such form, petitioner, after some hesitation, answered, upon advice of counsel, "I don't know" (R. 88). The petition for certiorari incorrectly states that "acting under advice of his local board, he volunteered for induction and service in the Armed Forces" (Pet. 5). The supporting record reference (R. 130) is to the board's letter, referred to above in the text, which informed petitioner of the applicable regulations and procedures for volunteering by an alien in spite of a former DSS Form 301 application for relief. In fact petitioner never applied to his draft

Petitioner failed to comply with an order, issued March 26, 1946, granting him the privilege of voluntary departure, and on February 3, 1947, a warrant was issued for petitioner's deportation to Portugal (R. 19). Subsequently, the deportation proceedings were reopened to permit petitioner to introduce additional evidence. On November 7, 1949, after a further hearing, the hearing officer concluded that, since petitioner's additional evidence related only to the already established fact of economic hardship, the order of deportation ought not to be disturbed (R. 20–21).[5]

With respect to petitioner's allegations that he did not "knowingly or wilfully claim exemption from service" and that he was "erroneously and improvidently advised" (R. 11), petitioner offered only the following testimony:

At his deportation hearings in 1944, petitioner, in explaining his reason for seeking deferment as an alien, had testified that in 1940 he tried to enlist in the United States Navy and Coast Guard which had turned him down because of his alienage (R. 68; cf. R. 144, 146), but that "[s]ince then I own my own apartment house

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board for voluntary induction. In 1950, after petitioner became ineligible for enlistment by reason of age, he apparently made repeated attempts to enlist (R. 12).

[5] Although the complaint alleged (R. 21) that petitioner had "exhausted each and every administrative remedy provided by law", it contained no allegation that petitioner had appealed to the Board of Immigration Appeals from the last ruling of the hearing officer.

and home and have a wife and one child and that is the reason I wanted to be exempted from the draft" (R. 44). He also testified: "At the time I filed that Form 301 I was illegally in the United States and figured I couldn't become a citizen anyway. I figured I am Portuguese and I would have to remain with my country as long as I am a Portuguese citizen" (R. 65; see also R. 162–163, 66). He conceded that he had read the form 301 before signing it (R. 63).

At the hearing in the trial court, petitioner testified that he filed Form 301 at a time when, after inquiring about a postponement of his induction for one month because of a pending law suit, "a fellow" had told him that he did not have to go to a lot of "bother" if he would execute the form claiming exemption as an alien and that he would be "better off" since he could "stay out completely" (R. 155–156). He also testified that he was told that he would not be thrown out of the country, because he had a "perfect right" to file the form as "an alien" (R. 156). Petitioner offered no testimony that he was ever told by anyone that he could accept the benefits of Form 301 and still become an American citizen.

Following the hearing in the District Court, the trial judge, after finding that petitioner had "voluntarily executed and filed DSS Form 301 claiming exemption from military service as a neutral alien", held that petitioner was, therefore,

"debarred from becoming a citizen of the United States", and consequently he was "statutorily ineligible for suspension of deportation under the provisions" of Section 19 (c) of the Immigration Act (R. 112–113). As the District Court stated (R. 109):

> On the facts presented the petitioner's only error was a lack of foresight, an inability to foresee that his atitude might change when World War II had ended. The plaintiff consistently attempted to evade military service and now seeks to repudiate his conduct merely because he did not have sufficient foresight to see that it might result in his deportation.

On appeal, the Court of Appeals modified the judgment of the trial court "so as to dismiss the action for failure of the complaint to state" a claim upon which relief could be granted and, as so modified, affirmed the judgment (R. 175; Pet. App. v.). Therefore, that court did not review the evidence adduced in the District Court or the trial judge's fact findings.

ARGUMENT

Review by this Court of the decision of the Court of Appeals is unnecessary because the decision below is clearly correct and is not in conflict with the decisions of this Court or of any of the circuits. Petitioner has wholly failed to establish any right to relief, either by his plead-

ings, as held by the Court of Appeals, or by his proof, as held by the District Court.

1. The Court of Appeals correctly held, in accordance with the Government's original defense, that the complaint failed to state a claim for relief. The grounds for petitioner's claim of eligibility to relief under Section 19 (c) of the Immigration Act, despite his filing of DSS Form 301, are his allegations, as shown in the Statement (*supra*, p. 6), that he "did not knowingly or wilfully claim exemption from service," but that the IV-C classification granted him was "requested" by him because he "was erroneously and improvidently advised so to do"; that he had never intended to evade military service, but had been refused enlistment, due to his alienage before his claim of exemption and due to age a few years later, and that he had unsuccessfully attempted to withdraw his application for relief from military service (R. 11–12). Clearly, petitioner's bare allegation that he had filed DSS Form 301 upon erroneous and improvident advice does not state any ground for relief. If it were intended to claim mistake as a ground for escaping the consequences of such filing, it failed to meet the requirements of Rule 9 (b), F. R. Civ. P., which requires that, "[i]n all averments of * * * mistake, the circumstances constituting * * * mistake shall be stated with particularity."

Even if technicalities are disregarded and all reasonable inferences in petitioner's favor are drawn from the allegations of the complaint, it does not state a cause of action. There is nothing to permit any inference that at the time petitioner filed DSS Form 301 he was unable to understand English; that in filing the form he relied upon any erroneous advice of any Government agency; that he did not understand that such filing debarred him from citizenship; or that he filed DSS Form 301 believing that he was requesting exemption on any ground other than that of neutral alienage. Cf. *Machado* v. *McGrath*, 193 F. 2d 706, 708 (C. A. D. C.), certiorari denied, 342 U. S. 948.

The additional allegations, that petitioner never intended to evade military service and that later he had unsuccessfully attempted to withdraw Form 301, do not help to spell out a claim upon the ground of mistake or any other ground. Ineligibility to citizenship resulting from the filing of Form 301 was certainly not dependent upon any intent to evade the draft. Likewise, the allegation with respect to petitioner's attempt to withdraw Form 301, even if it were a ground for relief, does not allege that he followed the procedure provided by the local board for requesting such withdrawals, or that he sought administrative review of the local board's action. See *Machado* v. *McGrath*, *supra*, at 707, fn. 2. Thus, the allegations do not bring the complaint within

any principle upon which relief could be granted. Compare *Moser* v. *United States,* 341 U. S. 41; *Machado* v. *McGrath, supra.*

2. Moreover, even if the complaint were to be made sufficient on its face, the facts proved at the hearing in the trial court show beyond question that, as that court found, petitioner is not entitled to any relief. The record contains no denial of knowledge on petitioner's part that the filing of Form 301 would result in his debarment from citizenship. On the contrary, petitioner's testimony, given in 1944 at his deportation hearing, that he read Form 301 (which contained the debarment clause) [6] before signing it (R. 63), and that at the time he filed it he knew he was in the country illegally and "couldn't become a citizen anyway" (R. 65), clearly shows that he knew of the disqualification from citizenship to be incurred by filing this form.

Nor is there any evidence that petitioner relied upon any representation of any high authority that the filing of Form 301 would not debar him from citizenship. Even assuming *arguendo* that the volunteered advice was given him by a local draft board clerk or member and that such advice could be binding on the Government,[7] the

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[6] See footnote 1, p. 2 *supra.*

[7] Petitioner's statement that he "acted on the improvident advice of his local draft board" (Pet. 4) is not sustained by either the pleadings or proof. Petitioner's vague 1953 testimony that "a fellow" told him he would be "better off" (R.

advice testified to by petitioner himself had no relation to his eligibility to citizenship. According to his own testimony, he was merely offered the gratuitous advice that by filing Form 301, he, as an alien, could escape the draft and a lot of "bother" in getting the deferment he had been unsuccessfully seeking (R. 156). To that extent, petitioner was correctly apprised of his rights. Likewise the assurance petitioner received, as he testified, that he would not be thrown out of the country for filing Form 301 because he had a "perfect right" to do so, was correct as far as it went. There is no evidence that petitioner was so advised by someone who had any knowledge that petitioner was illegally in this country. Furthermore, petitioner does not make any claim that he filed Form 301 in the belief that it would excuse him from the consequences of his illegal entry.

The deportation proceedings were instituted against petitioner, not because he filed Form 301, but because of his illegal entry into the country which, as he recognized, made him vulnerable to deportation. He is now ineligible for the privilege of suspension of deportation because of his disqualification for citizenship occasioned by his

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156) to claim the exemption hardly supports his counsel's contention. Furthermore, the Government is not bound by unauthorized acts or statements of its officers or agencies. See *United States* v. *San Francisco*, 310 U. S. 16, 31–32; *Sanitary District* v. *United States*, 266 U. S. 405, 427; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 408–409.

filing of Form 301, which he did with full knowledge that it carried such disqualification. Thus, *Moser* v. *United States,* 341 U. S. 41, and *Machado* v. *McGrath,* 193 F. 2d 706 (C. A. D. C.), certiorari denied, 342 U. S. 948, upon which petitioner relies (Pet. 36–37), are wholly inapposite. Petitioner's failure to foresee that his filing of Form 301 would, as a result of his debarment from citizenship, render him ineligible for suspension of deportation, was not induced by any representation to which even he himself could testify.

The bar to petitioner's citizenship was not removed by his letter of April 1945, in which he requested the local board to withdraw his Form 301. The evidence clearly shows that petitioner failed to comply with the procedure prescribed by the Selective Service Regulations,[8] which provided

[8] Local Board Memo. No. 112, as amended Dec. 20, 1943, Part V, par. 3, provided in pertinent part:

"Even though a neutral alien has filed a DSS Form 301, he may volunteer for induction by filing with his local board an application for voluntary induction (Form 165) in duplicate. The application for relief from military service (Form 301) may not be actually withdrawn from the files, as it is a part of Selective Service Records. The effect of the DSS Form 301 being on file is a matter for the courts to determine, and even though a person who has filed DSS Form 301 volunteers for induction, and is inducted, the courts may hold that such persons cannot become citizens. In order that there may be no misunderstanding on the part of a person who volunteers for induction under these circumstances,

that a registrant who had filed Form 301 could not physically withdraw it, but that he could volunteer for induction by filing Form 165, "Application for Voluntary Induction." Petitioner obtained the benefits of exemption during two years of active war. He did not, when he withdrew his claim at the end of April 1945 (R. 80–81), volunteer to serve. There is thus no reason not to hold him to the known effect of his knowing act in claiming exemption.

Petitioner further contends (Pet. 30–31) that the Board of Immigration Appeals, by allowing him an opportunity to withdraw his claim to exemption, has held, as he asserts, that he was entitled to withdraw such claim and that therefore the Government's present action to deport him is inconsistent with its prior decision. This contention is specious. The Board of Immigration Appeals in ordering the reopening of his deportation hearing to allow petitioner an opportunity to withdraw his Form 301 did not purport to recognize any right of petitioner to make such with-

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it is suggested that the Application for Voluntary Induction (Form 165) have typed upon its face, prior to the signature, the following:

"'I have formerly filed an Application by Alien for Relief from Military Service (Form 301) but I am volunteering for induction and service in the armed forces of the United States in spite of such former application for relief from such service. In doing so, I understand that the effect to be given to my former application for relief from military service is a matter which must be determined by the courts.'"

drawal, nor did it decide the merits with respect to the consequences of his exemption. As its order stated, it had merely "deferred" action on petitioner's application for relief under Section 19 (c) to allow him an opportunity to withdraw, if possible, Form 301. Thus, the Board of Immigration Appeals merely afforded petitioner full opportunity to exhaust all possible means to develop a record in support of his application for the discretionary relief.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 382

JOAO SIMOES BARREIRO,
Petitioner,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States,
Respondent.

PETITIONER'S RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION.

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PETITIONER'S RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Pursuant to the leave granted by the standing rules of this Court which regulate the procedure on applications for *writs of certiorari*, the petitioner thus responds to the brief heretofore filed by the Attorney General of the United States in opposition to the

petition heretofore filed for the issuance of the writ to review the judgment of the United States Court of Appeals for the Ninth Circuit.

RESPONDENT HAS MISCONCEIVED THE REAL QUESTION PRESENTED TO THIS COURT FOR DECISION.

This misconception may be stated as follows:

There has never been any dispute as to the good moral character of the petitioner. This was specifically found by the presiding inspector of the Immigration and Naturalization Service of the Department of Justice at the original hearing of the deportation proceedings on August 4, 1945. (T. R. 16.) It was likewise found "that the respondent (the appellant and petitioner in this action) attempted to withdraw his request for relief from military service." It was likewise found, and was conceded in the trial court "that the deportation of the respondent would result in serious economic detriment to his United States citizen wife and child." (The petitioner now has two children who are citizens of the United States.) At a later hearing it was specifically found by the presiding inspector that "deportation of the respondent would result in serious economic detriment to his citizen wife and child as his wife has no occupation except that of housewife, and if the respondent had to go she would have to go with him and that would break up his home here and his son would be raised in a different place, his wife was born and raised here and has all of her family here. Her parents are old

and could not support her. She would have difficulty in supporting her child." (There are now two children.)

The presiding inspector, however, sought to mitigate the hardship which the wife would suffer by stating that before her marriage she "used to work in a cannery to support her parents and herself." (T. R. 73.) Yet, the Department of Justice would tear the petitioner from the arms of his wife and children and send him into permanent exile in what has now become to him a foreign land, leaving his children without the care of a father, and forcing his wife, who is no longer a young woman, to seek employment in a cannery, where, in the rather crude diction of the hearing officer, "she used to work."

Why?

Because, so argues the Government, petitioner "is unable to withdraw his request for relief from military services as a neutral alien under Section 3(a) of the Selective Service and Training Act." (T. R. 16.)

To state the matter otherwise, once an alien has filed a claim for exemption from service in the armed forces because of his alienage, his act is absolutely irrevocable. The claim may have been filed through a mistake of law or fact; the alien might not even have known what he was signing; he may have acted upon improvident advice, or even fraudulent advice, but the claim once filed cannot be withdrawn.

That the foregoing harsh, cruel and, we submit, absurd, construction of the statute, is not that of one

lone, possibly prejudiced, probably overzealous, and certainly illiterate hearing officer. It was the attitude taken by the United States Attorney in the trial court. Thus at page 137 of the transcript of the record, the United States Attorney states to the trial judge:

> "It is our contention that being ineligible for citizenship by reason of having withdrawn his declaration of intention provided by the Selective Service law, the Attorney General was without any authority to grant any discretionary relief. In other words, the only case in which he could grant relief is where there had been no exemption, no claimed exemption from military service filed, and he was without any authority in any event to grant the relief prayed for."

Again at the foot of the same page:

> "But the Attorney General was prevented from granting deportation (suspension of deportation), in any case where an alien was not admissible for citizenship, and this man was not asserted eligible for the reason that he claimed exemption as a neutral alien."

Again at page 141, the United States Attorney said:

> "We will stipulate that if it hadn't been for the withdrawal of his, for his having claimed exemption as a neutral alien before his draft board, that it would have been possible under Section 155, Title 8, for the Attorney General to have suspended the deportation of this man."

This attitude was approved, by implication at least, in the findings of the trial judge, which, although

labeled "Findings of Fact", are in reality naught but conclusions of law (T.R. 111), and in the opinion of the Court of Appeals which is annexed to the petition for a *writ of certiorari*.

Accordingly, it is clear that from the very inception of the deportation proceedings, it has been the contention of the Department of Justice that the Attorney General lacked the power to suspend the deportation of petitioner, notwithstanding (as set forth in the petition page 23) that on March 28, 1945, the then Attorney General made an order deferring the application of petitioner for suspension of deportation "for the purpose of giving him **an opportunity to withdraw his application for exemption from the draft.**" The two communications, addressed respectively to the Department of Justice and to the local Selective Service Board, withdrawing "unqualifiedly and unreservedly" the claim for exemption, are set forth at page 24 of the petition.

It is against this wholly unwarranted, absurd, unjust and inhuman construction of the statute that we are moved to protest with all the vigor at our command. It is a fundamental rule of statutory construction, that courts will not construe a statute in such a manner as to result in inconvenience, absurdity, injustice or oppression.

Burnet v. Guggenheim, 288 U.S. 280, 53 S.Ct. 369, 77 L.Ed. 748;

Green v. Liter, 8 Cranch 229, 3 L.Ed. 545;

Wilson v. Rousseau, 45 U.S. 646, 11 L.Ed. 1141;

Knowlton v. Moore, 178 U.S. 41, 20 S.Ct. 747, 44 L.Ed. 969;

Beach v. United States, 144 Fed. (2d) 533.

"It is not to be supposed that the framers of a statute contemplated a violation of the rules of natural justice."

Crafford v. Warwick County, 87 Va. 110, 12 S.E. 147.

To the contrary, it is to be presumed that the legislature intended the law not to work an injustice.

United States v. City National Bank, 31 Fed. Supp. 530;

Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413, 86 A.L.R. 249.

RESPONDENT HAS MISCONCEIVED THE PROVISIONS OF THE STATUTE AND THE PURPOSE OF THE ACTION, AND THE EFFECT OF A DECREE IN FAVOR OF PETITIONER.

It should not be, but apparently it is, necessary to state that the purpose of this action is not to compel the respondent to suspend deportation, but merely to obtain a decree declaring petitioner to be eligible for naturalization and eligible to apply for and obtain citizenship in the discretion of the Attorney General, pursuant to the provisions of Section 155 (c) of Title 8 of the United States Code which was in effect at the time of the commencement of this action. We are convinced that if this Honorable Court should rule that respondent has that power, the respondent will

exercise it in conformity with the dictates of humanity and justice. The act of the Attorney General in suspending deportation would be subject to veto, under the provision of the Dies Bill, by a resolution of both Houses of Congress stating in substance that Congress does not favor the suspension of such deportation. All that the action seeks is a decree that the Attorney General is not precluded from suspending deportation where the claim of exemption has been withdrawn.

THE ATTEMPTS OF PETITIONER TO ENLIST IN THE ARMED FORCES BOTH BEFORE AND SUBSEQUENT TO THE INSTITUTION OF THE DEPORTATION PROCEEDINGS.

Of this matter respondent makes no mention in his brief in opposition. In paragraph IV of the complaint (T.R. 11) which is set forth *in haec verba* at page 11 of the petition for a *writ of certiorari*, petitioner sets forth that before he was ever called upon to enlist in, or become a member of the armed forces of the United States, he endeavored to enlist in the Navy, but was rejected by the recruiting authorities upon the ground that he was an alien; that he thereafter made a second attempt to enlist in the Navy, and was rejected because of age; that thereafter he attempted to enlist in the Naval Reserve, in the Marine Corps Reserve, in the Army, in the Air Force, and that he finally made a last and equally futile attempt to enlist in the Navy. These repeated and futile attempts to bear arms for this country are wholly ignored.

THE COURT OF APPEALS HAS ERRED IN RULING THAT PETITIONER HAD NOT EXHAUSTED HIS ADMINISTRATIVE REMEDY.

This is one of the grounds upon which it is said by the Court of Appeals that the complaint failed to state a claim upon which relief could be granted. Apparently the learned judge who wrote the opinion failed to notice the allegation of paragraph VIII of the answer of J. Howard McGrath, the respondent's predecessor in office in which "defendant **admits that plaintiff has exhausted his administrative remedies** and that the Immigration and Naturalization Service will deport plaintiff from the United States on the aforesaid grounds assigned for such deportation." (T.R. 26.)

Immediately following this language the Government again states the contention with which we dealt in the first division of this response: "Defendant admits that plaintiff has been advised that he could not withdraw such claim for exemption from military services (*sic*)."

CONCLUSION.

We regret that we lack sufficient mastery of eloquent English prose to adequately protest against the injustice and inhumanity of the proceedings with which this petitioner has been harassed by the immigration officers during the terms of four Attorneys General. We shall not make the attempt. We shall, rather, in lieu of any attempt of our own, conclude with the language of Mr. Justice Douglas of this

Court in which legal learning and literary excellence are so aptly blended:

> "Respect for law does not thrive on captious interpretations. Deportation can be the equivalent of banishment or exile. The stakes are indeed high and momentous for an alien who has acquired his residence here. **We will not attribute to congress a purpose to make his right to remain here dependent on circumstances so fortuitous and capricious as those upon which the Immigration Service has here seized.** The hazards to which we are now asked to subject the alien are too irrational to square with the statutory scheme."
>
> *Delgadilla v. Carmichael,* 332 U.S. 338, 68 S. Ct. 10, 92 L.Ed. 17.

It is respectfully submitted that the petition for a *writ of certiorari* should be granted to the end that this so-great question of statutory construction, presenting as it does a profound appeal to reason, justice, and humanity, should be reviewed and determined by the ultimate authority of this high Court.

Dated, San Francisco, California,
November 12, 1954.

JOAO SIMOES BARREIRO,
Petitioner in Propria Persona.

JOSEPH A. BROWN,
Of Counsel.